Supreme Court, U.S.
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No. 96-1060

In the Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PENERO MILLER, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act of 1952, a person born abroad out of wedlock to a United States citizen father and an alien mother can become a United States citizen, as of the date of birth, only if the person is legitimated or paternity is acknowledged or adjudicated during the person's minority. 8 U.S.C. 1409(a). In contrast, a person born abroad out of wedlock to a United States citizen mother and an alien father is deemed a United States citizen at birth, without any requirement of legitimation or proof of maternity during the person's minority. 8 U.S.C. 1401(g). The question presented is:

Whether 8 U.S.C. 1409(a) violates the equal protection component of the Fifth Amendment's Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 96 F.3d 1467. The opinion of the district court (Pet. App. 26-31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1996. The petition for a writ of certiorari was filed on January 6, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in the Philippines on June 20, 1970. She was born out of wedlock to a Filipino

mother and a United States citizen father, Charlie R. Miller, who was stationed in the Philippines as a member of the United States military. Her birth certificate identifies her mother as Luz Peñero; it does not identify her father's name or nationality. Pet. App. 2, 26-27.

2. Several months after her 21st birthday, petitioner applied to the Department of State for registration as a United States citizen. Pet. App. 2, 27. Her application was denied on the ground that she failed to establish paternity before her 21st birthday, as required by 8 U.S.C. 1409(a). Pet. App. 3-4, 29.[1] On

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[1] Section 1409(a) provides, in relevant part, that Section 1401(g), which confers citizenship on certain foreign-born children,

> shall apply as of the date of birth to a person born out of wedlock if —
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years —
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

July 27, 1992, Mr. Miller obtained a voluntary paternity decree from a Texas state court, establishing that he is petitioner's biological father. *Id.* at 4, 26 n.1. Petitioner submitted that paternity decree to the Department of State and requested reconsideration of her application. The Department of State, however, adhered to its original determination. *Id.* at 27, 32-35.

3. Petitioner then filed this action in the United States District Court for the Eastern District of Texas, alleging that 8 U.S.C. 1409(a) violates the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 4, 27. Respondent moved to dismiss or, in the alternative, to transfer venue. *Ibid.* The court transferred the case to the United States District Court for the District of Columbia. *Id.* at 5, 27.

After the transfer, respondent renewed the motion to dismiss, and the district court dismissed the action on the ground that petitioner lacked standing. Pet. App. 5, 26-31. The court determined that "[e]ven if this court should conclude that 8 U.S.C. § 1409(a) is unconstitutional, this court could not grant citizenship to [petitioner]," because "this could only be accomplished by legislative action." *Id.* at 31. Accordingly, the court held that petitioner "lacks standing because she does not meet the redressability requirement." *Ibid.*

Although this provision was amended in 1986 to require legitimation or establishment of paternity before the child's 18th birthday, petitioner falls within a narrow statutory age bracket that allowed her to meet these requirements before her 21st birthday. See 8 U.S.C. 1409 note (effective date of 1986 amendment).

4. The court of appeals held that petitioner has standing, but rejected her claim on the merits. Pet. App. 1-25. With respect to standing, the court of appeals concluded that if the district court had held Section 1409(a) to be unconstitutional, it could have found that she was a United States citizen pursuant to Section 1401(g).[2] "Such a finding would not have violated [the] proscription on the exercise of judicial equitable power to confer United States citizenship in the absence of legislative authority." Pet App. 7.

Turning to the merits, the court held (Pet. App. 8-9) that the appropriate standard of review for the constitutionality of Section 1409(a) is the "facially legitimate and bona fide reason" test of *Fiallo* v. *Bell*, 430 U.S. 787 (1977), in which the Court upheld the grant of certain immigration privileges to the alien children and parents of female United States citizens, but not to those of male United States citizens. The court of appeals, defining "the issue before us [as] whether the additional requirements imposed by Section 1409(a) on the illegitimate child of an American father represent an unconstitutional denial of equal protection based on (a) the status of the child and (b) the sex of the parent," Pet. App. 10, found "the Supreme Court's decision in *Fiallo* to be dispositive on both counts." *Ibid.* It concluded that

> in light of [*Fiallo*'s] holding and the Court's reference to "the perceived absence of close family ties" between illegitimate children and their natural fathers as well as to the problems of proof in paternity determinations, we see no basis for concluding that section 1409(a) is unconstitutional. Rather, we conclude, as did the Ninth Circuit, that "a desire to promote early ties to this country and to those relatives who are citizens of this country is not a[n ir]rational basis for the [challenged statutory] requirements."

Id. at 12-13 (quoting *Fiallo*, 430 U.S. at 798-799, and *Ablang* v. *Reno*, 52 F.3d 801, 806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996)). The court of appeals further found it "entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father," because "[a] mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." Pet. App. 13.

The court of appeals rejected petitioner's argument that the Texas state court's paternity decree applied retroactively to her birth, and that she therefore had satisfied Section 1409(a), even though the decree was issued after her 21st birthday. The court held that "[t]o allow Ms. Miller to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation." Pet. App. 14.

Judge Wald concurred in the judgment. Pet. App. 15-25. She criticized Section 1409(a) as "based simply on the stereotyping assumption that a mother will be closer to * * * children born out of wedlock," Pet. App. 16, and on outdated concerns about the difficulties of proving paternity, *id.* at 18-20. Judge Wald con-

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[2] Section 1401(g) of Title 8 confers citizenship from birth on "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States," provided the United States citizen parent satisfies certain requirements of physical presence in the United States or its possessions.

cluded, however, that this Court's decision in *Fiallo* "forecloses us from holding that the imposition of [Section 1409(a)'s] requirements on U.S. citizen fathers but not on U.S. citizen mothers is unconstitutional." *Id.* at 16.

ARGUMENT

In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), this Court reaffirmed that judicial review of immigration and naturalization legislation is limited to determining whether a challenged provision is supported by "a facially legitimate and bona fide reason." *Id.* at 794-795. The court of appeals correctly concluded that *Fiallo* forecloses petitioner's challenge to Section 1409(a). Just last Term, this Court denied certiorari in *Ablang* v. *Reno*, 116 S. Ct. 701 (1996) (No. 95-505), which involved a virtually identical challenge to a predecessor to 8 U.S.C. 1409(a), and there have been no intervening developments that would support a different result in this case. Further review therefore is unwarranted.

1. *Fiallo* is dispositive of petitioner's claims, and she does not ask this Court to reconsider that decision. In *Fiallo*, petitioners challenged 8 U.S.C. 1101(b), a provision of the Immigration and Nationality Act of 1952 that granted preferential immigration status to the qualifying children or parents of United States citizens. 430 U.S. at 788. In the case of children born out of wedlock, the law recognized the mother's relationship to the child under all circumstances, but it recognized the father's relationship only if the child was legally legitimated before the child turned 18 and while the child was in the legal custody of the father. *Id.* at 788-789 & n.1. The petitioners alleged that the provision discriminated

unlawfully on the basis of sex, marital status, and illegitimacy; denied them due process by establishing "an unwarranted conclusive presumption"; and burdened various fundamental rights. *Id.* at 791.

In rejecting those arguments, the Court identified two "facially legitimate and bona fide reason[s]," *Fiallo*, 430 U.S. at 794, for Congress's decision not to extend preferential immigration status to nonlegitimated children of United States citizen fathers. First, there was "a perceived absence in most cases of close family ties" between fathers and their illegitimate children; second, there was "a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799. The Court noted that Congress might have given "substantial weight" to the "inherent difficulty of determining the paternity of an illegitimate child," which the Court found to be "compounded when it depends upon events that may have occurred in foreign countries many years earlier." *Id.* at 799 n.8.

The Court held in *Fiallo* that "[i]n the inevitable process of 'line drawing,'" it was "appropriate for Congress to consider not only the nature of [kinship] relationships but also problems of identification, administration and the potential for fraud." 430 U.S. at 795 n.6. The Court acknowledged that the law precluded relief even in cases in which a particular father and child could prove the existence and strength of their family relationship. *Id.* at 789. It also noted the petitioners' contentions that the provision was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children," and that then-existing administrative procedures could address problems of proving paternity. *Id.* at 799 n.9. It

concluded, however, that those arguments should be addressed to Congress, *ibid.*, because "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision," *id.* at 799 (citing *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)).

The court of appeals correctly relied on *Fiallo* to conclude, first, that Congress legitimately may use immigration and citizenship statutes to promote early ties to relatives in this country; and second, that the greater likelihood that a father will lack close ties to his overseas illegitimate child justifies requiring special evidence of such ties. Pet. App. 10-14. Here, as in *Fiallo*, these "facially legitimate and bona fide" considerations justify Congress's "broad * * * policy choice[s]," and defeat petitioner's claim of "'double-barreled' discrimination based on sex and illegitimacy." *Fiallo*, 430 U.S. at 794-795.

There is no merit to petitioner's argument (Pet. 13) that *Fiallo* is not controlling because it involved the admission of alien relatives of United States citizens, while this case involves the grant of citizenship to the foreign-born offspring of United States citizens. The power "to establish an uniform Rule of Naturalization," Art. I, § 8, Cl. 4, including the power to confer citizenship on persons born outside the United States, "was long ago adjudged by this court to be vested exclusively in Congress." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898) (citing *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259 (1817)). The Ninth Circuit also has held that *Fiallo* governs the analysis of equal protection challenges to statutes that confer United States citizenship upon persons born abroad. *Ablang* v. *Reno*, 52 F.3d 801, 805-806 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); *Wauchope* v. *United States Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993); *Runnett* v. *Shultz*, 901 F.2d 782, 787 (9th Cir. 1990). Petitioner cites no holding by this Court or any court of appeals to the contrary, and we are aware of none.

2. Petitioner's reliance (Pet. 9-10) upon *Plyler* v. *Doe*, 457 U.S. 202 (1982), and *Trimble* v. *Gordon*, 430 U.S. 762, 772 (1977), is misplaced. Both cases reinforce the extraordinary deference courts accord congressional determinations concerning immigration and citizenship. *Trimble*, decided the same day as *Fiallo*, concerned an equal protection challenge to a state inheritance statute that permitted illegitimate children to inherit by intestate succession through their mothers but not through their fathers; the state supreme court had upheld the statute on the ground that a lineal relationship is more difficult to prove with respect to paternal ancestors. 430 U.S. at 770. This Court reversed, concluding that the acknowledged "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." *Id.* at 772. The statutory classification based on legitimacy, the Court concluded, was not "carefully tuned to alternative considerations." *Ibid.* (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 513 (1976)). In *Fiallo*, however, the Court expressly distinguished *Trimble*, based on precedent "clearly indicat[ing] that legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' * * * as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (quoting *Trimble*, 430 U.S. at 772 (quoting *Lucas*, 427 U.S. at 513)). Indeed, in *Fiallo*, the Court reiterated that, "in the exercise of its broad power over immigration and naturalization, 'Con-

gress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792 (quoting *Mathews* v. *Diaz*, 426 U.S. 76, 80 (1976)).

Plyler also directly reinforces *Fiallo*'s principle of deference to congressional determinations concerning "the character of a relationship between [an] alien and this country." *Plyler*, 457 U.S. at 225 (quoting *Diaz*, 426 U.S. at 80). The *Plyler* Court expressly reaffirmed "the federal prerogative to control access to the United States, * * * the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation," 457 U.S. at 219 n.19, and the judiciary's "unusual deference" to Congress's "delicate policy judgments" with respect to "admission to our Nation and status within our borders," *id.* at 225 (citing *Diaz*, *supra*; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); and U.S. Const. Art. I, § 8, Cl. 4). The Court then noted that States enjoy no such powers, 457 U.S. at 225; *id.* at 219 n.19, and concluded that once aliens were within a State's jurisdiction, lawfully or not, that State could not, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny education benefits to their children, absent a showing of a substantial state interest, *id.* at 230. Nothing in *Trimble* or *Plyler* suggests a departure from *Fiallo*'s "facially legitimate" standard for reviewing immigration and citizenship legislation, or from *Fiallo*'s conclusion that the relatively greater difficulty of proving paternity, and the relatively greater likelihood that fathers will lack close ties to their foreign-born illegitimate children, warrant a requirement that a child who claims to be the offspring of a male United States citizen establish that fact before attaining majority.

3. Petitioner's reliance (Pet. 19-21) upon the Ninth Circuit's decision in *Wauchope* v. *United States Department of State*, 985 F.2d 1407, 1414 (1993), is also mistaken. The statute invalidated in *Wauchope* awarded United States citizenship to the foreign-born offspring of United States citizen fathers and alien mothers, but not to the foreign-born offspring of United States citizen mothers and alien fathers. The asserted rationale for that distinction (which applied only to children born prior to 1934) rested on the proposition that many countries regarded the children of mixed-citizen marriages as obtaining the citizenship of the father. In that context, granting citizenship to the foreign-born children of United States fathers would not create problems of dual nationality, while conferring citizenship on the foreign-born children of United States mothers would. *Id.* at 1416. The Ninth Circuit invalidated the statute only because it concluded that the factual basis for the distinction was "simply incorrect," given that a "significant majority of countries" used gender-neutral principles to grant citizenship to children born on their soil. *Ibid.*[3] Here, by contrast, there is no evidence disproving the bona fide reasons relied upon in *Fiallo* and in the court of appeals below.

Indeed, the applicable Ninth Circuit precedent is not *Wauchope*, but *Ablang* v. *Reno*, 52 F.3d 801 (9th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). There

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[3] Congress subsequently removed the statutory distinction at issue in *Wauchope*. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 101, 108 Stat. 4306.

the Ninth Circuit found a rational basis[4] for the statute that preceded, and is virtually identical to, Section 1409(a).[5] That statute, like Section 1409(a), required children born abroad out of wedlock to United States citizen fathers and alien mothers to establish paternity during their minority in order to obtain United States citizenship, while children born abroad out of wedlock to United States citizen mothers and alien fathers were deemed United States citizens at birth. In *Ablang*, as here, the plaintiff was born out of wedlock in the Phillippines to a Filipino mother and an American father, and did not attempt to establish paternity until after the statutorily specified period had passed. There, as here, the plaintiff claimed that there was no rational basis to distinguish the foreign-born children of United States citizen mothers and the foreign-born children of United States citizen fathers.

The Ninth Circuit, relying on *Fiallo*, held that there was, indeed, a rational basis for the statute's proof-of-paternity requirements. "[I]n most cases," it observed, "there is a reasonable expectation that the

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[4] Although the Ninth Circuit has equated *Fiallo*'s "facially legitimate and bona fide reason" standard with the "rational basis" test (*Ablang*, 52 F.3d at 806 (citing *Wauchope*, 985 F.2d at 1414 n.3)), in our view the *Fiallo* standard is less rigorous than the rational basis test. Under either view, the court of appeals in this case correctly held that 8 U.S.C. 1409(a) is supported by a "facially legitimate and bona fide reason." Pet. App. 9-14.

[5] Because Ablang was born in 1946, she challenged the Nationality Act of 1940, the predecessor to the provision of the Immigration and Nationality Act of 1952 that petitioner challenges. The relevant requirements for proof of paternity under the two statutes are materially indistinguishable.

illegitimate child's maternal descent will be easier to trace than her paternal descent." 52 F.3d at 805. As for the time limit for establishing paternity, the court accepted as reasonable the government's contentions that "proof may be harder to obtain as the years go by" and that Congress had a legitimate "desire to promote early ties to this country and to those relatives who are citizens of this country." *Id.* at 805-806. The court of appeals below expressly agreed with those conclusions. Pet. App. 13.[6]

4. Contrary to petitioner's contention (Pet. 20-22), she never obtained United States citizenship, and she therefore was never deprived of her United States citizenship. Petitioner errs in asserting (Pet. 20) that 8 U.S.C. 1401(g) conferred citizenship upon her at birth, subject only to the condition subsequent of legitimization before her 21st birthday. Section 1409(a), which specifically addresses children born out of wedlock, is an express limitation on Section 1401(g), a general provision addressing citizenship of foreign-born children having one United States citizen parent. Section 1409(a) makes clear that Section 1401(g) "shall apply" to a person in petitioner's circumstances only "if" two conditions are met: first, her father must agree to provide for her support during her minority; and second, paternity must be acknowledged or adjudicated, or she must be legitimated, before she reaches the age of 21. Thus, the court of appeals correctly concluded that peti-

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[6] Petitioner's reliance (Pet. 8-11, 18-19) upon *LeBrun* v. *Thornburgh*, 777 F. Supp. 1204 (D.N.J. 1991), is similarly misplaced. *LeBrun* is flatly inconsistent with *Fiallo*, *Ablang*, and the District of Columbia Circuit's decision in this case, and because it is only a district court decision, it furnishes no basis for granting review here.

tioner could be declared a citizen by virtue of the general rule of Section 1408(g) only if it declared the specific rule of Section 1409(a) unconstitutional. Pet. App. 6-7. Accord *Ablang*, 52 F.3d at 803 (agreeing that "citizenship does not inhere under the [predecessor provision] unless and until paternity is established, provided this takes place by the age of majority").

Similarly, petitioner errs in arguing (Pet. 22) that the Texas state court decree should be given retroactive effect to the date of her birth. Section 1409(a) clearly provides that a foreign-born child of a United States citizen father may obtain citizenship through her father only if she is legitimated or paternity is established "while the person is under the age of [21] years." As the court of appeals correctly held, "[t]o allow Ms. Miller to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation." Pet. App. 14; see *Ablang*, 52 F.3d at 802 (denying citizenship application where plaintiff submitted, after her 21st birthday, her United States citizen father's affidavits acknowledging paternity and genetic testing results proving paternity by a 95.77% probability). Accordingly, petitioner has presented no basis to conclude that the court of appeals erred in denying her application for citizenship or that her case warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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